

SECTION 3 - LEGAL CONSIDERATIONS

3.1 General Introduction

The Agency's EDI projects were established to support facilities that voluntarily wish to support submissions of data electronically. Certain projects will continue to require continuation of the current paper forms. Regulations as currently written require the forms and signatures. Refer to the individual Project EDI Implementation Guidelines for the specifics of that project.

Businesses require control over their contractual correspondence. Such control includes the determination of when correspondence is transmitted, to whom it is transmitted, when it reaches the recipient, and an appraisal of the accuracy, integrity and risks of the communication. Some of the legal issues include:

- C Various offer and acceptance rules,
- C The propriety of EDI in lieu of hard copy documents,
- C The competency of sufficiency and evidence,
- C Electronic mailbox controls,
- C Legal and regulatory record retention issues,
- C Ownership and liabilities, and
- C Various risks of transmissions.

Most commercial law has been developed without specifically addressing electronic message systems. The precise legal status of EDI transmissions is therefore unclear in many cases.

EDI has been used successfully for a considerable number of years. For many companies, legal uncertainties have not posed a substantial obstacle to the adoption of EDI. In many instances, the legal risks of using EDI — when compared to the risks associated with traditional paper-based trading systems — have been considered to be manageable. Certain legal risks have been addressed with special agreements between trading partners and the adoption of appropriate in-house policies.

It is important that new users consult with counsel throughout the EDI implementation process. This chapter provides a very brief introduction to some of the issues counsel should consider when a new user implements EDI. The full range of issues that must be dealt with, and the importance of any particular issue, will vary from one user to the next.

EDI implementation should initiate a process by the business entity of rethinking its entire records management and retention policies. The ultimate decision regarding scope and retention period of electronic records depends on the company's overall business strategy and requirements.

3.2 Record Keeping

The EDI transmission facilitates the submission of data by trading partners. The hard copy retention of forms is an individual program consideration that may be specified in regulations.

Internal control systems should be reevaluated in the context of EDI to assure responsibility for data maintenance, including audit trail, transaction reconciliation, and backup capability.

When business transactions are recorded on paper documents, businesses can store those documents as evidence of what took place. The intent of EDI is to eliminate the transmission of paper documents. Internal record keeping systems should therefore be reevaluated in the context of EDI. The ideal EDI record retention system meets the following record keeping criteria:

- C Copies of all EDI transmissions must be retained.
- C EDI transactions must be retained in both the original and translated format in addition to normal application file retention.
- C Storage medium for EDI transactions must be determined.
- C Transmission activity logs containing pertinent time information must be retained.
- C All programs used in the EDI system must be retained for the life of the record retention.
- C Records must be able to be retrieved in a form that can be admissible in any judicial or other proceedings.
- C Record retention periods must be established.

3.3 Authentication

Authentication refers to the establishment or verification of a claimed identity. This may be the sender or receiver associated with a message. Authentication of an EDI transaction is contained in the transaction. All EDI transactions have the ability to identify all parties involved.

Another device commonly used for authentication is the Personal Identification Number or PIN. When an Agency Project Office implementation requires a PIN, it is placed in the transaction with the identity of the individual and the individuals organization.

It is important that the source and the integrity of data transferred between the trading partners be assured before the data is manipulated. The security and controls needed to provide a proper level of assurance is a business decision that should be based on an assessment of the risks involved. The decision to implement a Message Authentication Code (MAC) should be mutual between trading partners and stated as a requirement in the trading partner agreement.

Traditionally, paper documents and signatures have been used to authenticate the data that constitute commercial transactions. Authentication of EDI transmissions requires different methods of authentication. With the implementation of any particular EDI system, users and their counsel should ask the following questions within the context of the user's particular needs:

- C Will the integrity and completeness of data transferred between trading partners be adequately assured before it is relied upon?
- C Will the source of a message, and the legal authority of that source, be satisfactorily verified before the message is relied upon?
- C If determined necessary, will adequate records be kept to show that authenticity of messages was tested?

EDI poses no different threat from any automated system that utilizes telecommunications. The issue is automation and electronic data vs a paper-based system. EDI formats simply provide a structure to that data.

3.4 Trading Partner Agreement

Trading partner agreements (TPA) are an important part of EDI systems. They serve as the "interface specification" between trading partners and provide specific details of the legal agreements that define how the electronic commerce is to be conducted. Qualified legal advice is required when a TPA is drafted. However, the TPA must be more than a legal agreement between two organizations that exchange data.

Because the use of an electronic medium affects the trade relationship, TPA's are generally recognized as fundamental to the EDI trade relationship. TPA's can:

- C Bolster the enforceability of electronic transactions,
- C Reduce confusion and potential misunderstanding,
- C Apportion liability between the trading partners,

- C Define confidentiality and security obligations,
- C Serve as an educational tool and implementation checklist, and
- C Provide an important audit and control mechanism.

The scope and treatment of issues addressed by a TPA generally depend on:

- C The nature of the anticipated transactions,
- C The policies and perspectives of the trading partners,
- C An assessment of the risk, and ultimately,
- C The issues upon which the trading partners reach agreement.

The TPA should have the following characteristics:

- C Administrative efficiency,
- C Simplified legal approval,
- C Definiteness, and
- C Certainty to expedite trade.

3.5 Third-Party Agreements

If a user employs a VAN, the company that supplies the VAN services will probably require that the user enter into a data communications agreement with it. Among the issues the user should consider addressing in such agreement are the following:

- C A description of the services to be provided.
- C The warranty by the VAN of its services.
- C The liability of the VAN for a breach of the agreement or any damages resulting from the mistakes of the VAN or its employees.
- C The security, confidentiality, and integrity of messages handled by the VAN.
- C The responsibility of the VAN in the event of a system failure or disaster.
- C The disposal of data stored by the VAN in the event of a disagreement or an interruption or termination of services.

- C A description of the applicable pricing structure.
- C The termination of the agreement.
- C An assumption of an independent, third-party review of the third-party vendor.

3.6 Laws, Rules, and Regulations

There is no adequate or comprehensive source of EDI law, but there are a few sources of laws, rules and regulations that users may wish to consult. They are available through the American Bar Association (ABA). Other sources may be applicable for transactions within specific markets, industries or jurisdictions.

When implementing EDI, users and their counsel should consider whether any special laws, rules or regulations apply to the users. Utilities and government contractors should carefully consider whether regulations applicable to them restrict the implementation of EDI. It is not uncommon, for example, for government regulations to require documents to be written on paper or have ink signatures.

Users should also be aware that the International Chamber of Commerce has adopted Uniform Rules of Conduct For Interchange of Trade Data by Teletransmission (UNCID). UNCID purports to set forth voluntary rules of communication by EDI users. A copy of the UNCID rules may be obtained from the ICC Publishing Corporation, 156 5th Ave., New York, New York 10010. It should be noted that ANSI X12 neither endorses nor opposes UNCID.

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